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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Excess PacifiCorp Income Tax Cost Monies Collected in Rates	DOCKET NO. 05-035-98 **UTAH COMMITTEE OF CONSUMER SERVICES RESPONSE TO MOTION TO DISMISS**

Pursuant to Commission Rule R746-100-3(I) and Utah Code §63-46b-6, the Utah Committee of Consumer Services ("Committee") files this response to the Answer and Motion of PacifiCorp ("PacifiCorp" or "Utility") to Dismiss the Committee's Request for Agency Action ("RFA") that initiated the opening of this docket.

INTRODUCTORY STATEMENT

PacifiCorp has moved to dismiss the RFA under Utah Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Despite correctly citing the legal standard governing the granting of a motion to dismiss,[1] its Motion and Answer ("Motion and

[1]"[A] complaint should be dismissed if the 'plaintiffs would not be entitled to relief under the facts alleged *or under any state of facts they could prove to support their claim*.'" *Franco v.*

Answer") is nevertheless laden with the selective discussion of facts, issues and unfounded presumptions that the legal standard is there to guard against. The Motion to Dismiss is misplaced and must be denied.[2]

ARGUMENT

I. PACIFICORP'S MOTION TO DISMISS IS WITHOUT MERIT

A party moving to dismiss a cause of action for failure to state a claim upon which relief may be granted bears a heavy burden where, as in this case, the factual and legal issues are not only complex but raise questions of 'intent' as well as 'knowledge'.

The RFA alleges: (1) a violation of United States Securities & Exchange Commission ("SEC") rules promulgated to effect the purposes and intent of the Public Utility Holding Company Act of 1935 ("PUHCA"); (2) a violation of the 2000 tax agreement between PacifiCorp Holdings, Inc. and its operating subsidiaries, including Pacificorp; (3) a violation of the Utah Commission's November 23, 1998 order approving the ScottishPower/PacifiCorp merger; (4) a failure on the part of PacifiCorp to properly account for income tax savings it was

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The Church of Jesus 'Christ of Latter-day Saints, 21 P.e3d 198, 202 (Utah 2001), as cited and quoted on page 3 of PacifiCorp's Motion to Dismiss and Answer.

[2]Footnote 1 of PacifiCorp's Motion and Answer questions the Committee's legal authority to bring the Request for Agency Action before the Commission without the filing being signed by "not less than 25 consumers" pursuant to Utah Code §54-7-9. The Utah statute creating and empowering the Committee, specifically Utah Code §54-10-4, authorizes it to "bring original actions in its own name before the Public Service Commission of this state."

receiving at the consolidated level; (5) a failure to take those savings into account when applying for recovery of its income tax expenses in rates; and (6) a failure to properly and timely inform Utah regulatory parties of those income tax savings.

As is evident from PacifiCorp's Motion and Answer, the RFA also raises issues regarding: (7) Utah regulatory policy with regard to how income tax expenses should be calculated; (8) the extent to which such expenses are recoverable in the rates the Utility charges its Utah customers for electric service; (9) retroactive ratemaking and whether the actions and events in question constitute exceptions to that rule;(10) the Utility's intent with respect to not properly accounting for the monies at issue; and, finally, (11) when the Committee knew of the tax savings the Utility was receiving at the consolidated level and whether it responded in a timely and responsible way to that information.

In the process of deciding whether to grant PacifiCorp's Motion to Dismiss, the Commission must consider the above legal and factual issues and circumstances – and perhaps others not mentioned as well – and then ask itself whether the Committee is entitled to *no* relief under *any state of facts it could prove to support its claim.*[3] This is the legal standard, which the Utility correctly cites in its Motion and Answer, and which has been expressed in various ways. In *Cazares v. Cosby,* 2003 UT 3, ¶ 2, 24 P.3d 1184, the Utah Supreme Court stated:

> when determining whether a trial court properly dismissed an action under rule 12(b)(6), we assume that the factual allegations in the complaint are true and we draw all reasonable inferences in the light most favorable to the plaintiff.

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[3]*Franco v. The Church of Jesus Christ of Latter-Day Saints,* 21 P.3d 198, 202 (Utah 2001).

In the case of *Whipple v. American Fork Irrigation Co.,* 910 P.2d 1218, 1220 (Utah 1996), the Utah Supreme Court defined the standard this way:

> The purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the merits of a case.

The Commission must also bear in mind that the RFA and the Motion and Answer raise questions about the 'intent' of PacifiCorp and the Committee and what they did nor did not know at various points in time. 'Intent' and 'knowing' are factual determinations that have been deemed inappropriate for resolution on a motion to dismiss for failure to state a claim on which relieve could be granted. *Richards Irr. Co. v. Karren,* 880 P.2d 6 (1984).

It should be apparent, from reading the Motion and Answer, that the Utility has carefully picked and expounded a particular set of facts, issues and presumptions, and colored its selection with a slant singularly favorable to PacifiCorp and its owner. It is that selective sifting and presuming that the above-defined legal standard for granting a motion to dismiss is there to prevent.

PacifiCorp makes numerous legal and factual presumptions where the more valid or proper answer or resolution could be quite different. Were the SEC Audit findings regarding the allocation of consolidated income tax savings a meaningless exercise, as PacifiCorp asserts, or do those findings disclose a serious breach of PUHCA and SEC ring-fencing measures? Were the actions of PacifiCorp and its owner, in misappropriating, and not properly accounting for, over $325 million dollars from 1999 through fiscal tax year 2003 "lawful" and "legal" or "unlawful" and "illegal"? Is a "stand-alone" computation of a public utility monopoly's income tax expense the 'be-all and end-all', or simply the beginning of a proper regulatory process to determine the income tax expense it should be allowed to recover in rates? If reflecting a consolidated income tax savings in utility rates constitutes *ipso facto* subsidizing regulated operations with unregulated assets or monies, why is the taking by non-regulated operations of income tax payments generated by regulated assets and earnings not a subsidy of non-regulated operations?

These are some of the already-evident issues in this proceeding for which the Motion and Answer presumes a definitive answer. Its selective rendering of the factual circumstances and prejudgment of the merits of issues yet to be aired and analyzed are fatal flaws. At best, it further identifies relevant factual circumstances and issues in this proceeding; but that falls far short of demonstrating there are no factual or legal issues to be resolved. The Motion to Dismiss must be denied.

II. THE ISSUES IN THIS PROCEEDING CAN NOT BE DISPOSED OF BY A MOTION TO DISMISS.

Without attempting the comprehensive response and refutation that can only effectively occur once needed discovery has been completed and the Commission has the benefit of expert testimony, a brief discussion of some of those arguments is warranted here to further demonstrate the inappropriateness of granting a motion to dismiss at this initial stage of the proceedings.

1. Were SEC Rules Violated and Does the Violation Matter? PacifiCorp devotes seven pages of its Motion and Answer to trivializing PHI's misappropriation of $325 million from its profitable subsidiaries since 1999. It uses such words as "purported violation;" *See* Motion and Answer at 9; "procedural" *See* Motion and Answer at 9; and "technical" violation of the law. *See* Motion and Answer at 11. It describes the SEC audits findings as "routine in nature and limited in scope;" *See* Motion and Answer at 7; and the reallocation of $325.1 million from PHI back to its profitable subsidiaries as an effort "to fashion a remedy consistent with its "insignificance." *See* Motion and Answer at 9.

Needless to say, not everyone shares PacifiCorp's view. Most ratepayers would consider the unauthorized flow of millions of dollars of purported income tax expense from ratepayer pockets through the Utility into the pocket of the Utility owner to be quite significant. The fact that those monies went to subsidize owner business costs that have absolutely nothing to do with providing electric service in Utah would measurably add to their concern.

As the Motion and Answer correctly points out, it is not the SEC's function to set just and reasonable Utah rates. *See* Motion and Answer at 5. That is the function and responsibility of this Commission. Sending the reallocated monies back to the profitable subsidiaries where they may simply be dividended, or otherwise returned, *back up* to the owner may satisfy the metes and bounds of SEC jurisdictional authority and concern; but it in no way satisfies or resolves the state regulatory issues surrounding those monies.

2. "Unlawfulness" or "Illegality." PacifiCorp faults the RFA for using the words "illegal" or "unlawful" to describe PacifiCorp's and PHI's violation of SEC rules and the parties' own written tax allocation agreement, *See* Motion and Answer at 13, and advises the Commission to give no heed or "credit"to such "conclusory allegations of unlawful conduct." *See* Motion and Answer at 4 and 15. Where is the substance to that argument?

Black's Law Dictionary defines "illegal" as "not authorized by law; illicit; unlawful; contrary to the law."[4] Webster's II New College Dictionary defines "illegal" as "1. Forbidden

[4] Black's Law Dictionary, Revised Fourth Edition. (St. Paul, Minn., West Publishing Co.

by law. 2. Forbidden by official rules."[5] Black's Law Dictionary defines "unlawful" as "that which is contratry to law or unauthorized by law."[6] The terms "illegal" and "unlawful" very accurately describe how $325 million ended up in PHI"s pocket in violation of governmental law, rules and the contractual understanding of the parties. PacifiCorp is the one to be faulted for misconstruing and trivializing the SEC audit findings and actions.

3. Meaning of SEC Rule 45(c). PacifiCorp's Motion and Answer asserts that the SEC's granting of an exception to SEC Rule 45(c) was so "routine" as to constitute the Rule itself; See Motion and Answer at 8; and "that PHI was, in theory, entitled to such exemptive relief from 1999 through 2003 was never a disputed issue." *See* Motion and Answer at 9. The SEC audit findings appear to quite clearly state what SEC Rule 45(c) means with respect to PHI's wrongful retention of the monies in question:

> Rule 45(c) does not permit the parent company of a registered holding company system to retain the tax benefit associated with its tax loss.[7]

PacifiCorp's argument on this point is, again, a very one-sided representation of the facts and

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1968), p. 882.

[5]Webster's II New College Dictionary (Boston, Houghton Mifflin Company), p. 550.

[6]Black's Law Dictionary, Revised Fourth Edition. (St. Paul, Minn., West Publishing Co. 1968), p.1705.

[7]SEC Audit Finding 13 (P-IER 38).

issues in this proceeding.

4. Is a "Stand-Alone Income Tax Computation" a Commission Policy End in Itself or a Means to a Policy End? PacifiCorp's Motion and Answer would make a "stand-alone income tax computation" the beginning and the end of any evaluative process to determine the income tax costs to be recovered in rates. It argues:

> Even if the Commission were to assume all of the allegations in the Committee Request were accurate, these allegations would not form the basis for any Commission relief in this proceeding. In all of the general rate cases during the Request Period, PacifiCorp calculated its income tax expense using a stand-alone methodology, consistent with Commission order and precedent. Thus, even if the SEC PUHCA Audit Findings had impacted the consolidated tax liability or PacifiCorp's separate-company tax liability, which they did not, the SEC PUHCA Auidit Findings would still be irrelevant for ratemaking purposes for calculating income tax expense.[8]

The Committee believes the Utility here considerably overstates Utah regulatory policy – as well as current FERC policy – on the function of a "stand-alone" income tax calculation for purposes of ratemaking. Even the FERC recognizes exceptions to a "stand-alone" income tax computation in determining utility income tax costs that should be recovered in rates.[9]

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[8]Motion and Answer, page 32.

[9]The FERC presently applies a "benefit/burden" methodology for judging "stand-alone" income tax calculations and whether consolidated tax savings should be considered in regulated rates. *City of Charlottesville v. Federal Energy Reg. Comm'n*, 774 F.2d 1205,1217. Even the FERC, however, concedes the wrongness of collecting income tax costs in regulated rates when "the corporation, or the partners or the members have [no] actual or potential income tax liability on that public utility income." May 4, 2004 <u>Policy Statement on Income tax Allowances</u>, Paragraph 32. Docket No. PL05-5-000; 111 FERC ¶ 61,139. See also *BP West Coast Products,LLC v. FERC,* 374 F3d 1263, 1286-89 (D.C. Cir. 2004).

The Motion and Answer cites the 1985 D.C. Circuit case of *City of Charlottesville v. Federal Energy Reg. Comm'n*, 774 F.2d 1205, as support for the contention that any required SEC or PUHCA allocation of consolidated income tax benefits is "irrelev[ant]" to determining the income tax expense that should be allowed in utility rates. *See* Motion and Answer at 37.

Despite its prominence as a D.C. Circuit Court Justice Scalia opinion, the *Charlottesville* case is not good case law for the present matter. It addresses factual circumstances where the FERC rejected the request of a regulated pipeline customer that FERC take into account, when setting pipeline rates, consolidated income tax savings derived from affiliate "gas exploration and development activities which in the early stages often generate substantial tax deductions and little income."[10] At issue was an "internal allocation by the holding company parent, Columbia Gas System, Inc." – not a PUHCA or SEC Rule-mandated allocation – of ratepayer monies from pipeline affiliates to gas supply affiliates in the form of consolidated income tax savings benefits. Given this factual context, the D.C. Circuit in *Charlottesville* held:

> As far as the pipelines' ratepayers are concerned, however, this "funneling" is somebody else's business. As the existence of this litigation testifies, what the ratepayers contribute to the consolidated tax liability is determined not by the amount of the parent's allocation, but the amount that the Commission allows as an operating expense.[11]

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[10] *Charlottesville* at 1209.

[11] *Id.* at 1218. This statement is actually contained within the quote PacifiCorp takes from the *Charlottesville* case. See Motion and Answer at 38.

Even the Charlottesville case cited by PacifiCorp upholds the fundamental principle that it is the responsibility of the rated-setting authority to determine the amount of income taxes to be allowed as an operating expense in rates. There is no reasoning in Charlottesville stating this Commission must disregard a federal rule-mandated allocation of consolidated income tax benefits. At issue in this proceeding is what this Utah Commission *should have allowed* as an income tax operating expense in light of those federally mandated allocations. The allocation question had already been addressed in the *Charlottesville* case. The D.C. Circuit was simply reviewing whether that FERC allocation was "reasonable." It was not determining the proper methodology for setting income tax costs in rates.

In fact, as the *Charlottesville* case makes clear, still standing as never over-ruled precedent is the U.S. Supreme Court decision of *FPC v. United Gas Pipe Line Co.,* 386 U.S. 237, 243-44, 87 S.Ct. 1003, L.Ed2d 18 (1967) holding:

> The question for the [FPC] was what portion of the single consolidated tax liability belonged to United. Other members of the group should not be required to pay any part of United's tax, but neither should United pay the tax of others. A proper allocation had to be made by the Commission. Respondents insist that in making the allocation the Commission would violate the statute unless in every conceivable circumstance, including this one, United is allowed an amount [in rates] for taxes equal to what it would have paid had it filed a separate return. *In their view United should never share in the tax savings inherent in a consolidated return, even if on a consolidated basis system losses exceed system gains and neither the affiliated group nor any member in it has any tax liability. This is an untenable position and we reject it.* Rates fixed on this basis would give the pipeline company and its stockholders not only the fair return to which they are entitled but also the full amount of an expense never in fact incurred. In such a circumstance, the Commission could properly disallow the hypothetical tax expense and hold that rates based on such an unreal cost of service would not be just and reasonable. [Emphasis added].

It is apparent from SEC Audit Finding 14 (P-IER 39) that the PHI consolidated tax group:

A. paid no federal income taxes in fiscal tax year 2001, while nevertheless collecting $109.6 million in tax payments from affiliates;

B. paid no federal income taxes in fiscal tax year 2002, while nevertheless collecting $89.6 million in tax payments from affiliates; and

C. paid no federal income taxes in fiscal tax year 2003, while nevertheless collecting $115.1 million in income tax payments from affiliates that year.[12]

It is not apparent from the SEC audit findings what income tax amounts PacifiCorp paid in fiscal tax years 2001 and 2002, but the SEC audit identifies it as having paid $74.5 million in fiscal tax year 2003 – a year when the PHI group had no federal income tax liability. The U.S. Supreme Court in *FPC v. United* categorically rejects the idea of ratepayers not participating in consolidated income tax savings under such circumstances. For ratepayers, it is not sixes, not an immaterial matter, whether the income tax expense they pay in their utility rates goes to the governmental taxing authority or to the owner. At the Utah state level, when a substantial state citizen does not pay its fair share of state income taxes, the absence must be made up by the other state citizens – most of whom are utility ratepayers – or those same citizens must forego the government services the additional tax monies would have afforded.

The Committee understands Utah regulatory policy on consolidated taxes to be one of not only seeking to protect ratepayers from unregulated business risks, but also of making sure ratepayers are not subsidizing non-regulated owner operations. To the extent a "stand-alone" income tax calculation – however defined and implemented – serves those policy ends, it is an

[12] SEC Audit Finding 14 (P-IER 39).

acceptable starting point for determining income tax costs in rates. To the extent the calculation becomes a policy end in itself, excluding ratepayers from *ever* sharing in consolidated income tax savings – even the tax savings the utility is receiving at the consolidated level, and obligates them to income tax costs that do not even exist on a consolidated basis, it clearly constitutes an arbitrary and unfair burdening of ratepayers and benefitting of non-regulated owner operations. Moreover, where it is a PUHCA-regulated holding company parent being subsidized, such a policy violates the purposes and intent of PUHCA law, as well.

5. Ring-Fencing and Subsidization. PacifiCorp defends its interpretation of "stand-alone" ratemaking as a "mechanism to protect ratepayers from fluctuations in tax expense associated with profits or losses of affiliated companies not under the jurisdiction of the Commission." *See* Motion and Answer at 33-34.

With all due respect for the wide-spread use of this and similar arguments today in utility regulatory circles, it nevertheless appears to the Committee to be an unfounded scare tactic. If a vigilant and fair Commission is present, why would there be an absence of protection? If rates are set in general rate cases on a prospective basis, why is a fluctuation in tax expense any more difficult to address than a change in labor expense or purchased power costs? The wrongness of such arguments lies in no small part with their myopic focus on the NOL loss element of the consolidated tax savings *dyad* and their utter neglect of the other element which, if not present, makes an NOL worth little more than the paper it is recorded on. What gives value to a NOL, for taxation purposes, is the taxable income it can offset or reduce. Where, as here, one is speaking of 'monetized' income tax savings – that is, where a 'fund' of income tax monies has been created as a result of the profitable consolidated group members paying into that fund the income taxes they would pay were they each filing and paying on a ‘stand-alone’ basis, and the consolidated income tax savings are the monies left in that ‘fund’ after the group’s consolidated income taxes have been paid – an NOL subsidiary has no more rational or equitable right to share in those monies than do the profitable subsidiaries that paid them.

If one is going to consider how utility ratepayers might be subsidized if they share in consolidated income tax savings, should one not similarly be concerned with the reverse subsidy that occurs when non-regulated operations monetize their tax loss out of utility income tax monies derived from regulated earnings and assets which non-regulated operations were never at risk for and contributed nothing to create?

As for the talk about exposure to non-regulated risks and losses, it would seem the “matching” argument that underlies that dire prospect, instead of a tool to effect fairness and equity, has become an inflexible, undeviating instrument that works only to the detriment of ratepayers. No one is saying non-regulated operations must take the risk of regulated losses (probably because there rarely are any) when non-regulated operations exclusively appropriate the consolidated income tax savings benefit. Consolidated income tax savings should be viewed for what they are: *consolidated;* the melding or merging of separate income and loss into a consolidated result that would not otherwise even exist. That result belongs to all the subsidiaries that created it. If that rationale is not acceptable, then the consolidated savings should at least be allocated as the second option under SEC Rule 45(c) (4) provides for: to the profitable subsidiaries.

6. Does the Utah Commission Ban Against Recovery of Merger-Transaction Costs in Rates Have any Teeth? Rather than confronting the Utah Commission’s ban against recovering any merger transaction costs in rates,[13] PacifiCorp makes the legerdemain argument that the Committee is tracing the wrong dollars. It asserts that the acquisition debt expense was paid with “shareholder” monies, not income tax cost monies:

[13]The RFA argues that PacifiCorp’s and PHI’s diversion of Utility income tax cost monies to the payment of interest expense on ScottishPower’s debt incurred in acquiring PacifiCorp violated a condition of the Utah Commission’ s acquisition or merger approval order. See Paragraphs 21-24 of the RFA.

> The Committee's argument is based on a flawed premise of ratemaking. The Committee argues that because rates collected from ratepayers are used by the parent company to pay for parent company expenses, then the parent company expenses are necessarily paid for by ratepayers. This argument confuses the amounts recovered from customers in rates with the expense paid by shareholders and must be rejected.[14]

Is PacifiCorp trying to say it has not been recovering interest expense on the acquisition indebtedness in Utah rates since the 1999 merger or acquisition? How then does it explain its response to an earlier Committee data request that the consolidated tax savings claimed by PHI "are not retained by the holding company but are used instead to satisfy interest expense payments on acquisition indebtedness."[15]

Quibbling over whether PHI paid its indebtedness expense with ratepayer monies collected to pay income tax costs or with ratepayer monies collected to pay the owner a return on its investment is not unlike trying to trace specific generated electrons to a particular customer account. The inability to trace specific electrons has not prevented the Utility from billing customers for electric service, and the inability to trace physical coins should not be allowed to frustrate reality. PHI, from 1999 forward, was subsidizing its acquisition transaction expense with ratepayer monies collected to pay income taxes that were never incurred. That is clear from

[14]Motion and Answer, page 45.

[15]PacifiCorp Response to Committee Data Request No. 40.15, Docket No. 04-035-42.

the SEC audit findings as well as the discovery response of the Utility noted above.

In its 1998 merger approval order, this Commission states it would be a violation of the order were PacifiCorp and its owner to recover "costs of time spent pursuing the merger by senior officials of PacifiCorp."[16] How can it then not be a violation to recover the interest expense on the acquisition cost itself? Putting the Commission's explicit ban aside for a moment, how can it comport with any reasonable ring-fencing objectives to make ratepayers pay, in any way, for the owner's acquisition costs? The owner can devote its allowable return on investment to paying its acquisition costs, but that does not justify diverting monies collected to pay legitimate operating costs to that end.

7. Do Prior Rate Case Settlements Preclude the RFA? That this Commission has, in the past, approved or accepted the use of a 'stand-alone' income tax computation for ratemaking purposes should not absolve PacifiCorp of the burden of including the income tax savings it was receiving at the consolidated level or from otherwise accurately disclosing what its income tax expense actually was. In any case, such a practice would not relieve the Utility of the burden to properly account for those tax savings – or to reasonably inform state regulatory parties of them

[16]This possible expense was cited by the Commission in its merger approval order as an example of the kind of acquisition transaction cost that is not to be recovered in rates. See RFA, paragraphs 22 and 23.

so the issue could at least be properly vetted at the ratemaking level.[17]

PacifiCorp asserts that the RFA constitutes "an unlawful repudiation" of the Committee's past agreements [Motion and Answer at 39]. How so? Where in any of the past rate case agreements the Committee has been party to has the matter of income tax savings allocated to PacifiCorp at the consolidated level ever been addressed? If it was never addressed, how can it be repudiated? The Committee's position in the most recent PacifiCorp general rate case, Docket No. 04-035-42, was that consolidated income tax savings should be shared with the Utility and its ratepayers *prospectively*. Even there the Committee did not raise the issue of past consolidated tax savings already allocated to the Utility *because it was not yet aware those savings already existed*.

The question here is 'sufficient information' or the lack thereof. What did the Committee and other regulatory parties know, and when did they know it? Did PacifiCorp have a duty to properly account for the monies in question, as well as a duty to inform regulatory parties of the income tax savings it was receiving at the consolidated level? The question of sufficient information is a critical one in regulatory law. The exercise of state regulatory responsibility cannot be properly occur in an absence of relevant and complete information:

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[17]Adequately informing and properly vetting the issue of consolidated income tax savings would seem to be particularly applicable in this case in light of the Utah Commission's merger approval order directive that the entire matter of "potential tax savings" arising from ScottishPower's acquisition of PacifiCorp be"preserv[ed] . . . for subsequent general rate treatment." [November 23, 1999 Report and Order, Docket No. 98-2035-04, page 28].

> Rate making is not an adversary proceeding in which the applicant needs only to present a prima facie case to be entitled to relief. (Citation omitted) A state regulatory commission, whose powers have been invoked to fix a reasonable rate, is entitled to know and before it can act advisedly must be informed of all relevant facts. Otherwise the hands of the regulatory body could be tied in such fashion it could not effectively determine whether a proposed rate was justified,. (Citation omitted).[18]

The Motion and Answer implies that, by being informed of the SEC audit and attending a July 9, 2004 meeting where "the Company discussed in detail all of the relevant Findings in the Audit Report, with a particular emphasis on the tax allocation issues," the Commission, Division and Committee were adequately informed of the income tax savings being allocated to PacifiCorp at the consolidated level from 1999 forward. *See* Motion and Answer at 14.

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[18] *Utah Department of Business Regulation v. Public Service Commission*, 614 P.2d 1242, 1245-46 (Utah 1980).

The Committee neither accepts nor denies PacifiCorp's allegations regarding past information provided to the Committee and other regulatory parties. The Committee does here state that not until Committee staff began to closely study the SEC audit report did they appreciate that the SEC audit findings meant something different from what PacifiCorp was saying they meant.[19] That process – and it was a process – of becoming aware of the possible implications of the audit report did not even begin until after the most recent PacifiCorp rate case was in settlement negotiations [Docket No. 04-035-42]. At that time the Committee asked legal counsel to review the SEC audit report and advise whether it was in any way relevant to the position the Committee was taking on prospective consolidated income tax savings in that rate case. Committee counsel advised that past consolidated tax savings were not an issue, and that the import and factual circumstances surrounding the SEC audit findings needed to be further explored prior to even considering whether to raise the matter.

It is proper to question whether the Committee acted in a timely manner with regard to the SEC audit findings. That question, however, pre-supposes that sufficient information was provided to the Committee – and provided in a way that was informative. The Committee believes whatever information PacifiCorp provided Utah regulatory parties since the1999 merger on the matter of consolidated income tax savings, or the pushing down of the acquisition indebtedness onto PHI's books, or the SEC audit was so minimized and marginalized by PacifiCorp explanations – or buried within piles of other data and information – that the

[19]At a June 30, 2005 meeting between the Utility, the Division of Public Utilities and the Committee, Utility representatives characterized the SEC Audit as nothing to be concerned about and certainly nothing that would in any way affect income tax costs in rates.

information was meaningless absent careful further analysis by the Committee. The Committee may stand corrected as a result of further discovery in this proceeding regarding the issue whether regulatory parties – ultimately the Commission – were in possession of adequate information to sufficiently understand the meaning and import of what was happening at the consolidated income tax level since 1999 to properly determine the income tax costs PacifiCorp should be allowed to recover in rates in the rate cases that occurred since the ScottishPower merger. PacifiCorp's Motion and Answer *presumes* an answer to that important inquiry that is entirely unwarranted for purposes of its Motion to Dismiss.

8. *Retroactive Ratemaking*. The Motion and Answer concedes that the rule against retroactive ratemaking does not bar corrective action by this Commission where an unforeseen event having an extraordinary effect on earnings or expenses is concerned, or where unlawful conduct has occurred. *See* Motion and Answer at 18. However, it does not agree that an unforeseen and extraordinary event occurred or that unlawful conduct took place.

Strangely, however, even though PacifiCorp properly cites the holding in *MCI Telecomm. Corp. v. Pub . Serv. Comm'n,* 840 P2d 765, 775 (Utah1992), that:

> "[a] utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected,"

See Motion and Answer at 21*,* it does not find the precedent applicable to this case. There was unlawful conduct (i.e., misappropriation of over $225 million of Utility monies); and there was a failure to properly inform regulatory parties of that conduct and its effect. What is missing?

As to the exception for an unforseen event having an extraordinary effect upon earnings or costs, the SEC audit findings were certainly unforeseen – even for PacifiCorp and its owner. Had those findings been foreseen ScottishPower would have acted much sooner than it did to seek an exception to the applicability of SEC Rule 45(c). $225.7 million – probably more – is an extraordinary sum by any measure, as is its effect on earnings.

The Committee believes this proceeding falls squarely within the exceptions to the rule against retroactive ratemaking. At the very least, however, this is not a matter to be resolved by a motion to dismiss.

SUMMARY AND CONCLUSION

The issue presently before the Commission is whether it should grant PacifiCorp's Motion to Dismiss. PacifiCorp argues the RFA should be dismissed because the Committee is entitled to *no* relief under any state of facts it could prove to support its claim and there are otherwise no issues of merit in the claim. The legal standard bears repeating here:

> The purpose of a [motion to dismiss for failure to state a claim] is to"challenge the formal sufficiency of the claim for relief, not to establish the facts *or resolve the merits* of a case"[emphasis added] *Whipple v. American Fork Irrigation Co.*, 910 P.2d 1218, 1220 (Utah 1996), as quoted in *Sony Electronics, Inc. v. Reber*, 103 p.3d 186,189 (Ut App 2004).

The Utility's Motion and Answer may serve to sharpen issues in this proceeding; but in no way does it demonstrate those issues and their merits have been resolved. It presumes the Utility's and PHI's actions in misappropriating over $225 million was free of any taint of unlawfulness. It presumes it had no duty to properly account for those income tax savings on its books, or to properly and timely inform regulatory parties of them in the four rate cases that have occurred since the ScottishPower merger. It presumes the Commission's policy regarding "stand-alone" income tax calculations precludes any adjustment to that calculation even where equity or law demand it. It presumes allowing ratepayer monies to go to subsidize non-regulated operations of the owner is appropriate while its reverse is a violation of reasonable ring-fencing objectives.

The Motion and Answer is long on presumptions and short on persuasive argument. Granting the Motion to Dismiss would be an arbitrary and indefensible decision The Committee respectfully urges the Commission to deny the motion and allow the Committee to proceed and present its case before the Commission.

Respectfully submitted this ___ day of November, 2005.

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Reed T. Warnick
Paul Proctor
Assistants Attorney General and
Counsel for the Utah Committee of
Consumer Services

CERTIFICATE OF SERVICE

I hereby certify that a copy of the UTAH COMMITTEE OF CONSUMER SERVICES RESPONSE TO MOTION TO DISMISS was sent by U.S. Postal Service first class mail, prepaid, and email on this the _____ day of November 2005 to:

Dan Gimble
Committee of Consumer Services
500 Heber M. Wells Building
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